BSN Commercial Bank (Malaysia) Bhd v Mesra Venture Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22–211 OF 2002
LOW HOP BING J
29 MARCH 2007

Civil Procedure — Judgment — Default judgment — Application to set aside default judgment — Whether delay a mere technicality—Failure to give reasons for delay

Civil Procedure — Judgment — Default judgment — Whether regularly obtained — Effect of failure to set aside judgment in default

Civil Procedure — Jurisdiction — Forum conveniens — Whether High Court at Melaka had jurisdiction over the defendant

Civil Procedure — Interest — Judgment debt — Whether contractual interest permissible

Contract — Damages — Penalty — Whether penalty interest contrary to law

Contract — Guarantee — Liability of guarantor — Whether second defendant as nominee director is detracted from liability

This second defendant appealed against the decision of the learned registrar who had on 3 January 2006 dismissed with costs the second defendant's application to set aside the judgment in default of appearance obtained by the plaintiff against the second defendant. The facts leading to the filing of the writ by the plaintiff arose from the plaintiff's demand for repayment of the banking facilities vide notices dated 6 September 2002 to both the defendants, which were not complied. The second defendant was at all material times the first defendant's director and guarantor. On 15 November 2002, the plaintiff commenced an action against both the defendants. Judgment in default of appearance was obtained against the first defendant on 11 April 2003, and against the second defendant on 17 February 2003. At the hearing of this appeal, it was argued for the second defendant that, inter alia, (a) the Melaka High Court was not the proper forum to hear this matter as the second defendant had a business address in Muar and the land charged to the plaintiff was also situated in Muar, in which case the Muar High Court was the proper forum; (b) the default judgment had been irregularly obtained as the writ and statement of claim had been served on the second defendant at the wrong address; (c) the facilities granted to the first defendant were ultra vires the first defendant's memorandum of

association, as a result of which the second defendant could not be liable; (d) the rate of interest exceeding 8% pa awarded to the plaintiff in the default judgment is excessive as O 42 r l2 provides for the rate of 8% per annum only; (e) the plaintiff had imposed penalty and compound interest which was contrary to the law; (f) the second defendant was merely acting as a nominee director for the first defendant and so could not be liable for the debt of the first defendant; (g) the guarantee was not supported by consideration; and (h) the delay, if any, was merely technical. In reply, counsel for the plaintiff argued that (a) the second defendant's application in encl 27 had pursuant to O 42 r 13 occasioned a delay of 20 months after service of the judgment on her; (b) the Melaka High Court had jurisdiction over this matter as the cause of action arose in Melaka; (c) the writ had been served on the second defendant by AR registered post, addressed to her at her last known address; (d) the parties herein have agreed to the rate of interest; (e) the second defendant's liability was founded on the guarantee; and (f) the consideration for the guarantee was stated in the preamble thereto and clauses 1(i) and 5.

Held, dismissing the appeal with costs:

(1) The delay of 20 months occasioned by the second defendant cannot be said to be a mere technicality. The time frame set out in O 42 r 13 came into force on 1 August 1993. The second defendant making the application to set aside the default judgment must do so within this time frame of 30 days stated therein (*Lee Tain Tshung @ Lee Thien Chiung v Hong Long Finance Bhd* [2000] 3 MLJ 364 referred; *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysia Finance Berhad* [1996] 1 MLJ 30 and *Mohamed Taib Haji Ibrahim & Anor v Perwira Habib Bank Malaysia Bhd* [1987] 2 MLJ 123, distinguished) (see paras 14, 15).

(2) The second defendant has neither made an application for extension of time nor proffered any explanation for the 20-month delay, although it is incumbent on her to do so. Such omission or failure militates against the defendant's case (*Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* [2003] 4 MLJ 647; *Tractors Malaysia Sdn Bhd v Chiew Hong Huat & Ors* [1999] 2 CLJ 51; *Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors* [1998] 5 MLJ 108 referred) (see para 18).

(3) The second defendant as the first defendant's director and guarantor has applied for and obtained the facilities from the plaintiff in Melaka and the first defendant's registered address is also in Melaka. The question of jurisdiction is indeed a non-issue. It is clear that Melaka is the place where (i) the cause of action arose under s 23(1)(a); or (ii) the facts on which the proceedings are based existed or are alleged to have occurred under s 23(1)(c). The fact that the second defendant is in Muar does not mean that the Melaka High Court has no jurisdiction over her, as the Melaka High Court is a branch and so part and parcel of the High Court in Malaya. As the second defendant has executed the documents for the facilities in Melaka, I am unable to see how she could contend that the Melaka High Court is not the proper forum conveniens (see paras 23–25).

(4) The default judgment has been regularly obtained by the plaintiff. From the affidavit of service in encl 33, there can be no doubt that the writ had been

served on the second defendant at her last known address. Although the second defendant had given the Tangkak address as her address, the photographs in exhs OBY3 and 25 annexed to encl 33 reveal that no building was to be found at the Tangkak address, as it is now a vacant piece of land. Hence, the second defendant's denial of being served with a copy of the writ cannot be sustained (see paras 29, 32, 33).

(5) The first defendant's failure to mount a challenge on the default judgment means that the first defendant has accepted its liability based on the facilities, thereby putting a halt to any dispute by the first defendant in relation to the facilities. The liability of the second defendant on the other hand is founded on the guarantee executed by the second defendant in favour of the plaintiff (see para 36).

(6) Under the amended O 42 r l2, generally every judgment debt shall carry interest at the maximum rate of 8% pa, but an exception arises where the parties have agreed to another rate of interest. In view of the fact that the defendants have agreed to a rate other than the rate of 8% pa, the amendment O 42 r 12 which came into force on 11 December 1986, ie some 21 years ago, it is permissible for the plaintiff to include in the judgment debt either a rate of interest not exceeding 8% ('the statutory rate') or the rate which has been otherwise agreed between the parties ('the contractual rate') (*Lee Tain Tshung @ Lee Thien Chiung v Hong Long Finance Bhd* [2000] 3 MLJ 364, CA, referred) (see para 42).

(7) The authorities of *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223 and *Selva Kumar a/l Murugiah Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 do not support the second defendant's contention that a penalty interest is contrary to law. In fact, they militate against the second defendant's contention (see paras 46–48).

(8) The existence of consideration for the guarantee is contained in preamble and clauses 1(i) and 5 of the guarantee (*Chew Soon Tat v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 24, distinguished; *Development & Commercial Bank v Syarikat Farmco Sdn Bhd & Ors* [1988] 3 MLJ 275 and *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267, referred) (see para 53).

(9) The second defendant's liability is expressly contained in the guarantee and the fact that she is perceived as a nominee director does not detract from her liability as a guarantor (see para 61).

[Bahasa Malaysia summary

Defendan kedua ini telah merayu terhadap keputusan pendaftar yang bijaksana yang pada 3 Januari 2006 telah menolak dengan kos permohonan defendan kedua untuk mengenepikan penghakiman ingkar kehadiran yang dimasukkan oleh plaintif terhadap defendan kedua. Fakta yang telah membawa kepada pemfailan writ oleh plaintif timbul daripada tuntutan plaintif untuk pembayaran balik kemudahan perbankan berikutan notis bertarikh 6 September 2002 kepada kedua-dua defendan, yang mana langsung tidak diendahkannya. Adalah pada setiap masa material,

defendan pertama adalah pengarah dan juga penjamin. Pada 15 November 2002, plaintif telah memulakan tindakan terhadap kedua-dua defendan. Penghakiman ingkar kehadiran telah dimasukkan terhadap defendan pertama pada 11 April 2003, dan terhadap defendan kedua pada 17 Februari 2003. Semasa pendengaran rayuan ini, hujahan defendan kedua adalah, antara lain, (a) Mahkamah Tinggi Melaka tidak layak untuk menjadi forum bagi mendengar perkara ini kerana defendan kedua mempunyai tempat perniagaan di Muar dan tanah yang digadaikan juga terletak di Muar, yang mana Mahkamah Tinggi Muar adalah forum yang sesuai; (b) penghakiman ingkar yang telah dimasukkan adalah di luar aturan kerana penyerahan writ dan pernyataan tuntutan kepada defendan kedua adalah di alamat yang salah; (c) kemudahan yang diberikan kepada defendan pertama adalah melampaui kuasa memorandum persatuan defendan pertama, akibatnya defendan kedua tidak boleh dipertanggungjawabkan; (d) kadar faedah yang melebihi 8% setahun diberikan kepada plaintif untuk penghakiman ingkar adalah melampau kerana A 42 k 12 memperuntukkan kadar faedah sebanyak 8% sahaja (e) plaintif telah mengenakan penalti dan mencampurkan faedah yang bertentangan dengan undang-undang; (f) defendan kedua cuma bertindak sebagai wakil pengarah untuk defendan pertama dan tidak boleh bertanggungjawab untuk keberhutangan defendan pertama; (g) jaminan tidak disokong dengan sebarang balasan; dan (h) kelewatan, jika ada, hanya teknikal. Sebagai jawapan, peguam untuk plaintif menghujahkan bahawa (a) permohonan defendan kedua dalam Kand (27) mengikut peruntukkan A 42 k 13 terdapat kelewatan selama 20 bulan selepas penyampaian penghakiman ke atasnya; (b) Mahkamah Tinggi Melaka mempunyai bidang kuasa memandangkan kausa tindakan berlaku di Melaka; (c) writ telah diserahkan kepada defendan kedua melalui pos berdaftar AR, dialamatkan ke alamat terakhirnya (d) pihak-pihak di dalam ini telah bersetuju terhadap kadar faedah; (e) liabiliti defendan kedua berpandukan kepada jaminan; dan (f) balasan jaminan ada dinyatakan pada mukadimah dan klausa 1(i) dan 5.

Diputuskan, menolak rayuan dengan kos:

(1) Kelewatan selama 20 bulan yang dilakukan oleh defendan kedua tidak boleh diumpamakan sebagai alasan teknikal. Tempoh masa yang ditetapkan dalam A 42 k 13 berkuatkuasa pada 1 Ogos 1993. Defendan kedua ketika membuat permohonan untuk mengenepikan penghakiman ingkar mesti membuatnya di dalam ketetapan tempoh masa 30 hari (*Lee Tain Tshung @ Lee Thien Chiung v Hong Long Finance Bhd* [2000] 3 MLJ 364, referred; *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysia Finance Berhad* [1996] 1 MLJ 30 and *Mohamed Taib Haji Ibrahim & Anor v Perwira Habib Bank Malaysia Bhd* [1987] 2 MLJ 123, dibezakan) (lihat perenggan 14, 15).

(2) Defendan Kedua tiada membuat permohonan untuk melanjutkan masa ataupun menghulurkan sebarang penjelasan berkenaan kelewatan 20 bulan, walaupun wajib ke atasnya untuk berbuat demikian. Sebetulnya, kerana tidak melakukan atau kegagalan tersebut telah menghalang kes defendan (*Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223; *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* [2003] 4 MLJ 647, *Tractors Malaysia (1982) Sdn Bhd v Chiew Hong Huat & Ors* [1999] 2 CLJ 51; *Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors*[1998] 5 MLJ 108 dirujuk) (lihat perenggan 18).

(3) Defendan kedua sebagai pengarah defendan pertama dan penjamin telah memohon untuk dan mendapatkan kemudahan daripada plaintif di Melaka dan alamat berdaftar defendan pertama adalah juga di Melaka. Persoalan bidang kuasa juga bukan satu isu. Jelas sekali bahawa Melaka adalah tempat di mana (i) terjadinya kausa tindakan di bawah s 23(1)(a); atau (ii) fakta-fakta berkaitan prosiding pada dasarnya wujud dan dikatakan telah berlaku dibawah s 23(1)(c). Fakta yang mengatakan defendan kedua berada di Muar tidak bermakna Mahkamah Tinggi Melaka tiada bidang kuasa terhadapnya, memandangkan Mahkamah Tinggi Melaka juga adalah cawangan dan adalah sebahagian daripada Mahkamah Tinggi Malaya. Memandangkan defendan kedua telah melaksanakan dokumen-dokumen untuk kemudahan-kemudahan di Melaka, saya tidak dapat melihat bagaimana beliau boleh mengatakan bahawa Mahkamah Tinggi Melaka bukanlah satu forum yang sesuai (lihat perenggan 23–25).

(4) Penghakiman ingkar yang diperolehi oleh plaintif adalah di dalam aturan. Berdasarkan kepada afidavit penyampaian dalam kand (33), tidak terdapat sebarang keraguan berkenaan dengan penyampaian writ terhadap defendan kedua di alamat terakhirnya. Walaupun defendan kedua memberikan alamat Tangkak sebagai alamatnya, gambar dalam eks OBY3 dan 25 yang dilampirkan dalam kand (33) memperlihatkan bahawa tiada bangunan dijumpai pada alamat di Tangkak. Justeru, penafian defendan kedua berkenaan dengan penyampaian salinan writ tidak dapat dipertahankan (lihat perenggan 29, 32, 33).

(5) Kegagalan defendan pertama untuk mencabar penghakiman ingkar bermakna defendan pertama telah menerima liabiliti berdasarkan kemudahan-kemudahan, dan dengan itu pertikaian defendan pertama terhadap kemudahan tersebut telah terhenti sama sekali. Liabiliti defendan kedua pada masa sama adalah berpandukan kepada perlaksanan jaminan dipihak plaintif (lihat perenggan 36).

(6) Dibawah pindaan A 42 k 12, secara umumnya, setiap hutang penghakiman hendaklah membawa kadar maksimum 8% setahun, tetapi pengecualian akan timbul bila pihak-pihak telah bersetuju terhadap satu lagi kadar faedah. Berdasarkan kepada fakta bahawa defendan-defendan telah bersetuju terhadap kadar selain dari kadar 8% setahun, pindaan A42 k12 yang berkuatkuasa pada 11 Disember 1996, iaitu, lebih kurang 21 tahun yang lalu, plaintif adalah dibenarkan untuk memasukkan dalam hutang penghakiman sama ada kadar faedah tidak melebihi 8% setahun ('kadar berkanun') ataupun kadar yang telahpun dipersetujui oleh pihak-pihak ('kadar kontraktual') (*Lee Tain Tshung @ Lee Thien Chiung v Hong Long Finance Bhd* [2000] 3 MLJ 364, dirujuk) (lihat perenggan 42).

(7) Otoriti-otoriti *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223 dan *Selva Kumar a/l Murugiah Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 tidak menyokong pernyataan defendan kedua bahawa faedah penalti adalah bertentangan dengan undang-undang. Sebenarnya, ia menyanggah perdebatan defendan kedua (lihat perenggan 46-48)

(8) Kewujudan balasan dalam jaminan terkandung dalam mukadimah dan klausa 1(i) dan 5 jaminan tersebut, *Chew Soon Tat v Malaysia National Insurance Sdn Bhd* [1977] 1 MLJ 24, dibezakan; *Development & Commercial Bank v Syarikat Farmco Sdn Bhd & Ors* [1988] 3 MLJ 275 dan *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267 dirujuk) (lihat perenggan 53).

(9) Liabiliti defendan kedua dengan jelas terkandung dalam jaminan dan walaupun ia dilihat sebagai wakil pengarah tidak akan mengurangkan liabilitinya sebagai penjamin (lihat perenggan 61).]

Notes

For cases on default judgment, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 35–69.

For cases on forum conveniens, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 574–584.

For cases on judgment debt, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3242–3255.

For cases on penalty, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2967–2969.

For cases on liability of guarantor, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3502–3505.

Cases referred to

Bank Utama (Malaysia) Bhd v The owner (sic) of and other persons interested in the Vessel 'Pintas Samudra 1, Sri Johore Bahru Sdn Bhd & Ors [2003] 3 MLJ 236 (refd)

Carlsberg Brewery Malaysia Bhd v Soon Heng Aw Sons Sdn Bhd & Ors [1989] 1 MLJ 104 (refd)

Chew Soon Tat v Malaysia National Insurance Sdn Bhd FC (dist) [1977] 1 MLJ 241 (dist)

Development & Commercial Bank v Syarikat Farmco Sdn Bhd & Ors [1988] 3 MLJ 275 (refd)

Heng Cheng Swee v Bangkok Bank Ltd [1976] 1 MLJ 267 (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd CA [1996] 1 MLJ 223 (refd)

Lee Tain Tshung @ Lee Thien Chiung v Hong Long Finance Bhd [2000] 3 MLJ 364 (refd)

Malaysia Building Society Bhd v Univein Sdn Bhd [2002] 7 MLJ 501 (refd)

Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors [2001] 6 MLJ 223 (dist)

Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors [1988] 3 MLJ 165 (refd)

MBF Finance Bhd v Chew Liong Gak [1993] 1 LNS 307 (refd)

MBF Finance Bhd v Tiong Kieng Seng [2001] 4 CLJ 38 (refd)

Mohd Taib Haji Ibrahim & Anor v Perwira Habib Bank Malaysia Bhd [1987] 2 MLJ 123 (dist)

Ng Han Seng & Ors v Scotch Leasing Sdn Bhd [2003] 4 MLJ 647 (refd)

Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor [2003] 3 MLJ 67 (refd)

Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors [1988] 3 MLJ 210 (refd)

A *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 (refd)

Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In Receivership) [1996] 2 MLJ 461 (folld)

Selva Kumar a/l Murugiah Thiagarajah a/l Retnasamy [1995] 1 MLJ 817 (dist)

B *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 (refd)

Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors [1998] 5 MLJ 108 (refd)

Tractors Malaysia (1982) Sdn Bhd v Chiew Hong Huat & Ors [1999] 2 CLJ 51 (refd)

Tuan Hj Ahmed Abdul Rahman v Arab-Malaysia Finance Berhad [1996] 1 MLJ 30 (dist)

C

Legislation referred to

Evidence Act 1950 s 114(e)
Interpretation Acts 1948 & 1967 s 12
Rules of the High Court 1980 i O 10 r 1(1), O 13 r 1; O 42 r 13

D

AB Ng (AB Ng & Associates) for the second defendant.
Mark Taye (Taye & Co) for the plaintiff.

Low Hop Bing J:

E

APPEAL

[1] This is the appeal in encl 60 filed by the second defendant against the decision of the learned registrar who had on 3 January 2006 dismissed with costs the second
F defendant's application in encl 27 which sought to set aside the judgment in default of appearance obtained by the plaintiff against the second defendant on 17 February 2003, under O 13 r 1 of the Rules of the High Court 1980 ('the RHC').

[2] For brevity and convenience, a reference to an order and a rule is a reference to
G that order and rule in the RHC, unless otherwise stated.

FACTUAL BACKGROUND

[3] Pursuant to the application of both the defendants herein, the plaintiff vide
H letters of offer dated 20 October 1998, 12 May 1999, 29 July 1999 and 31 January 2000, and loan agreements dated 3 December 1998, 31 May 1999 and 11 March 2000 granted to the first defendant banking facilities in the form of loan stock, term loan, overdraft, trust receipt and bankers acceptance, all amounting to RM9.4m (collectively, 'the facilities').

I **[4]** The second defendant was at all material times the first defendant's director and guarantor.

[5] Vide letter dated 16 June 2001, the first defendant admitted default in the repayment of the facilities to the plaintiff.

[6] The plaintiff had demanded repayment of the facilities vide notices dated 6 September 2002 to both the defendants but the notices of demand were not complied with. **A**

[7] As at 31 July 2002 and 31 October 2002, both the first and second defendants' debts due and owing to the plaintiff were RM9,815,530.75 and RM10,044,801.93 respectively. **B**

[8] On 15 November 2002, the plaintiff commenced writ of summons against both the defendants. **C**

[9] Judgment in default of appearance was obtained against the first defendant on 11 April 2003 and against the second defendant on 17 February 2003.

[10] Only the second defendant filed the summons in chambers to set aside the default judgment obtained against her ('the default judgment'). **D**

DELAY

[11] It was argued by learned counsel Mr Mark Taye for the plaintiff that the second defendant's application in encl 27 had pursuant to O 42 r 13 occasioned a delay of 20 months after service of the judgment on her. **E**

[12] The second defendant's learned counsel Mr AB Ng contended, inter alia, that the delay, if any, is merely technical, citing O 2 r 1(1) and O 1A, *Tuan Hj Ahmed Abdul Rahman v Arab-Malaysia Finance Bhd* [1996] 1 MLJ 30 and *Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors* [1988] 3 MLJ 165. **F**

[13] I shall first proceed to analyse O 42 r 13 which, where relevant, reads as follows: **G**

> 13. Setting aside judgments and orders (O 42 r 13)
>
> Where in these Rules provisions are made for setting aside any judgment, a party intending to set aside such judgment must make his application to the Court and serve it on the party who has obtained the judgment within thirty days after the receipt of the judgment by him. **H**

[14] In my view, the delay of 20 months occasioned by the second defendant cannot be said to be a mere technicality.

[15] The time frame set out in O 42 r 13 came into force on 1 August 1993. The second defendant making the application to set aside the default judgment must do so within this time frame of 30 days stated therein. As an example, a defendant who made his application eight years after judgment was granted was disentitled to have the judgment set aside: (see *Lee Tain Tshung @ Lee Thien Chiung v Hong Long Finance Bhd* [2000] 3 MLJ 364, per NH Chan JCA (as he then was). **I**

[16] In *Tuan Haji Ahmed Abdul Rahman*, relied on by the second defendant, the Federal Court speaking through Edgar Joseph Jr FCJ made it clear that the judgment there had been irregularly obtained as it had been riddled with uncertainty and so it is readily distinguishable from the regular judgment in the instant case, as will be seen later in this judgment.

[17] The issue of delay in making an application to set aside a judgment in default of defence was not raised by the plaintiff in *Mohamed Taib Haji Ibrahim & Anor v Perwira Habib Bank Malaysia Bhd* [1987] 2 MLJ 123 and so the judgment of the then Supreme Court is of no assistance to the second defendant herein.

[18] Reverting to the factual background before me, it is to be noted that the second defendant has neither made an application for extension of time nor proffered any explanation for the 20-month delay, although it is incumbent on her to do so. Such omission or failure militates against the defendant's case: *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 at 229 per Gopal Sri Ram JCA; *Ng Han Seng & Ors v Scotch Leasing Sdn Bhd* [2003] 4 MLJ 647 at p 651, per Nik Hashim JCA (now FCJ); *Tractors Malaysia (1982) Sdn Bhd v Chiew Hong Huat & Ors* [1999] 2 CLJ 51 at p 58 per Richard Malanjum J (now CJ Sabah & Sarawak); and *Tan Ewe Chong & Ors v Pribudi Sdn Bhd & Ors* [1998] 5 MLJ 108 at p 116 per Jeffrey Tan J.

FORUM

[19] The second defendant relied on s 23(1) of the Courts of Judicature Act 1964(' s 23(1) ') to support the contention that the Melaka High Court is not the proper forum to hear this matter as she has a business address in Muar and the land charged to the plaintiff is also situated in Muar, in which case the Muar High Court is the proper forum.

[20] It was argued for the plaintiff that the Melaka High Court has jurisdiction over this matter as the cause of action arose in Melaka.

[21] In order to comprehend the second defendant's submission, it is necessary for me to refer to the governing provisions contained in s 23(1) as follows:

> 23 Civil jurisdiction – general
>
> (1) Subject to the limitations contained in Article 128 of the Federal Constitution the High Court shall have jurisdiction to try all civil proceedings where–
>
> (a) the cause of action arose; or
>
> (b) the defendant or one of several defendants resides or has his place of business; or
>
> (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
>
> (d) any land the ownership of which is disputed is situated, within the local jurisdiction of the court.

[22] As a starting point, art 121(1) of the Federal Constitution provides for two High Courts in our country viz the High Court in Malaya and the High Court in

Sabah and Sarawak. These two High Courts have jurisdiction to hear cases within their respective 'local jurisdiction' which, in relation to High Court in Malaya, is defined in s 3 of the Courts of Judicature Act 1964 as the States of Malaya which include Melaka and Muar as branches having concurrent jurisdiction: (see*Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 at pp 269–271 per Lim Beng Choon J (as he then was).

[23] It is to be noted that the second defendant as the first defendant's director and guarantor has applied for and obtained the facilities from the plaintiff in Melaka and the first defendant's registered address is also in Melaka. The question of jurisdiction is indeed a non-issue. It is clear that Melaka is the place where:

(1) the cause of action arose under s 23(1)(a); or

(2) the facts on which the proceedings are based existed or are alleged to have occurred under s 23(1)(c).

[24] The fact that the second defendant is in Muar does not mean that the Melaka High Court has no jurisdiction over her, as the Melaka High Court is a branch and so part and parcel of the High Court in Malaya.

[25] As the second defendant has executed the documents for the facilities in Melaka, I am unable to see how she could contend that the Melaka High Court is not the proper forum conveniens.

SERVICE OF WRIT

[26] It was canvassed for the second defendant that the default judgment has been irregularly obtained as the writ and statement of claim ('the writ') had been served on the second defendant at the wrong address, as her correct address is at Hostel Syarikat Lot 96 and 97, Batu 19, Jalan Segamat 84900 Tangkak, Johor ('the Tangkak address').

[27] The plaintiff retorted that the writ had been served on the second defendant by AR registered post, addressed to her at her last known address at No 254 Jalan Dato, 84200 Muar Johor ('the Muar address').

[28] In my view, this issue may be resolved by reference to O 10 r 1(1) which provides for the service of a writ in the following words:

> 10.1(1) Subject to the provisions of any written law and these rules, a writ must be served personally on each defendant or by sending it by prepaid AR registered post addressed to his last known address. (emphasis added)

[29] From the affidavit of service in encl 33, there can be no doubt that the writ had been served on the second defendant at her last known address, ie, the Muar address, which appears in:

(1) her letter of guarantee executed in favour of the plaintiff;

(2) the company documents of two companies viz the first defendant, and Linafil Spinning (M) Sdn Bhd, in both of which the second defendant was at all material times a director;

(3) her own statutory declarations sworn on 3 June 1999 and 15 March 2000; and

(4) her National Registration Identity Card.

[30] Section 12 of the Interpretation Acts 1948 and 1967 contains a deeming provision in relation to service by post, in the following words:

> 12. Service by post
>
> Where a written law authorises or requires a document to be served by post, then, until the contrary is proved, service:
>
> (a) shall be presumed to be effected by properly addressing, prepaying and posting by registered post a letter containing the document; and
>
> (b) shall be presumed to have been effected at the time when the letter would have been delivered in the ordinary course of the post.

(see *Pengkalen Concrete Sdn Bhd v Chow Mooi & Anor* [2003] 3 MLJ 67 per Suriyadi Halim Omar J (now JCA); *MBF Finance Bhd v Tiong Kieng Seng* [2001] 4 CLJ 38 per Clement Skinner J; *Bank Utama (Malaysia) Bhd v The owner* (sic) of and other persons interested in the Vessel 'Pintas Samudra 1, *Sri Johore Bahru Sdn Bhd & Ors* [2003] 3 MLJ 236 at 242–244 per Clement Skinner J; and *MBF Finance Bhd v Chew Liong Gak* [1993] 1 LNS 307 per Abdul Malek Ahmad J (now PCA)).

[31] Further, Pos Malaysia Bhd, in response to the enquiries by the plaintiff's solicitors, confirmed that the service had been effected on the second defendant on 10 December 2002.

[32] Although the second defendant had given the Tangkak address as her address, the photographs in exhs OBY3 and 25 annexed to encl 33 reveal that no building was to be found at the Tangkak address, as it is now a vacant piece of land. Hence, the second defendant's denial of being served with a copy of the writ cannot be sustained.

[33] I therefore hold that the default judgment has been regularly obtained by the plaintiff.

ULTRA VIRES TRANSACTION

[34] It was pointed out for the second defendant that the facilities granted to the first defendant were ultra vires the first defendant's memorandum of association, as a result of which the second defendant could not be liable.

[35] The plaintiff submitted to the contrary.

[36] It suffices for me to observe that the first defendant's failure to mount a challenge on the default judgment means that the first defendant has accepted its liability based on the facilities, thereby putting a halt to any dispute by the first defendant in relation to the facilities. The liability of the second defendant on the other hand is founded on the guarantee executed by the second defendant in favour of the plaintiff. The guarantee provides inter alia that the second defendant as a principal debtor shall guarantee and indemnify the plaintiff on all the debts due and owing by the first defendant to the plaintiff from time to time under the facilities.

[37] In the circumstances, I am unable to sustain the second defendant's above contention.

EXCESSIVE INTEREST

[38] The second defendant complained that the rate of interest exceeding 8% pa awarded to the plaintiff in the default judgment is excessive as O 42 r 12 provides for the rate of 8% per annum only.

[39] The plaintiff asserted that the parties herein have agreed to the rate of interest.

[40] In my opinion, the answer is to be found in the documents executed by the parties, viz the facilities agreement, debentures, legal charges and letter of guarantee, pursuant to which the second defendant has agreed to the rate of interest imposed by the plaintiff and the plaintiff has the right to vary the rate thereof. (see facilities agreement dated 11 March 2000 s 7.01 'Payment of Interest/Commission'; and s 7.03 'Variation of Interest Rate' and guarantee cl 1(1)

[41] The rate of interest exceeding 8% pa imposed on the default judgment is permitted under O 42 r 12, as amended, in the following words:

> 12 Interest on judgment debts (O 42 r 12)
>
> Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied. (emphasis added)

[42] Under the amended O 42 r 12, generally every judgment debt shall carry interest at the maximum rate of 8% pa, but an exception arises where the parties have agreed to another rate of interest. In view of the fact that the defendants have agreed to a rate other than the rate of 8% pa, and that the amendment to O 42 r 12 came into force on 11 December 1986, ie, some 21 years ago, it is permissible for the plaintiff to include in the judgment debt either a rate of interest not exceeding 8% ('the statutory rate') or the rate which has been otherwise agreed between the parties ('the contractual rate'): see *Lee Tain Tshung* per Ahmad Fairuz JCA (now CJ Malaysia) at p 389.

[43] As the rate of interest on the judgment debt is based on the contractual rate which is allowed under O 42 r 12, the second defendant's contention is without substance.

PENALTY INTEREST

[44] It was stressed for the second defendant that the plaintiff has imposed penalty and compound interest contrary to the law. Reference was made to *Malayan Banking Bhd v Chong Hin Trading Co Sdn Bhd & Ors* [2001] 6 MLJ 223 and *Selva Kumar a/l Murugiah Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817.

[45] The plaintiff disagreed.

[46] In considering *Malayan Banking Bhd,* I notice that one of the terms of the loan was the charging of a penalty interest of 1%. The issue before Abdul Wahab J was whether penalty interest was contrary to s 75 of the Contracts Act 1950('s 75') thereby creating a triable issue to bar the signing of a summary judgment under O 14. The learned judge held inter alia that the 1% penalty interest operates as the upper limit that may be claimed as damages. His Lordship's decision was not to the effect that the penalty interest was contrary to law.

[47] In *Selva Kumar*, the Federal Court in a judgment delivered by Peh Swee Chin FCJ (as he then was) held, inter alia, that in Malaysia, there is no distinction between liquidated damages and penalties as understood under English law and that in view of s 75 the court must determine what is reasonable compensation.

[48] In my view, the above two authorities do not support the second defendant's contention that a penalty interest is contrary to law. In fact, they militate against the second defendant's contention.

[49] In *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In Receivership)* [1996] 2 MLJ 461, cl 3.1 of the charge instrument prescribed the interest rate of 14.5% pa on monthly rests ('the prescribed interest') while cl 3.2 provided for an additional interest in the event of default by the borrower. One of the contentions presented for the borrower was that the additional interest amounted to a penalty which was irrecoverable under s 75. The Federal Court through the judgment of Peh Swee Chin FCJ (as he then was) at p 469F held, inter alia, that s 75 allows the penalty stipulated for (see also *Malaysia Building Society Bhd v Univein Sdn Bhd* [2002] 7 MLJ 501 at 523–525; and *Pusat Bandar Damansara Sdn Bhd & Anor v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 at 524A–C).

[50] In the circumstances, the second defendant's contention is untenable.

CONSIDERATION FOR GUARANTEE

[51] The second defendant challenged the validity of the guarantee on the ground that it was not supported by consideration (*Chew Soon Tat v Malaysia National*

Insurance Sdn Bhd [1977] 1 MLJ 241, and *Mohamed Taib Haji Ibrahim & Anor* were cited in support.

[52] It was argued for the plaintiff that consideration for the guarantee was stated in the preamble thereto and clauses 1(i) and 5.

[53] In my judgment, the existence of consideration for the guarantee is contained in preamble and clauses 1(i) and 5of the guarantee. The preamble recites as follows:

> In consideration of your opening or continuing an account with and making or continuing to make advances loans or … giving credit... to Mesra Venture Sdn Bhd … at my... request … I … hereby … agree with and guarantee you as follows …

[54] The guarantee is expressed as a continuing guarantee, in clauses 1(i) and 5 in the following words:

> 1. I... will pay you on demand:
>
> (i) all moneys which now are or may during the operation of this Guarantee be owing to you from the Customer or remain unpaid on the general balance of the Customer's account with you anywhere and on any account whatsoever... including interest...
>
> 5. This Guarantee shall be a continuing guarantee to you to the extent of Ringgit Malaysia Nine Million and Four Hundred Thousand with interest … on the sum claimable at the rate which is levied on the customer from time to time.

[55] In *Chew Soon Tat*, the guarantee was signed by the guarantor on 3 April 1972 undertaking to stand guarantee to the extent of RM100,000. The Federal Court speaking through Ali Ag LP (as he then was) held, inter alia, that the guarantee could not be impugned on grounds of absence or want of consideration but that the guarantor would only be liable for debts incurred after the date of the guarantee. It is significant for me to note that the guarantee there did not allude to the existence of a continuing guarantee as expressly stated in clauses l(i) and 5 in the instant case and so the facts are readily distinguishable.

[56] The facts in Chew Soon Tat, were indeed distinguished by Siti Norma Yaakob J (later CJ (M)) in *Perwira Habib Bank Malaysia Bhd v Fast Travel (M) Sdn Bhd & Ors* [1988] 3 MLJ 210 wherein the guarantee was a continuing guarantee whch guaranteed not only the facilities existing at the time of execution of the guarantee but also facilities to be made in the future; and that a continuing guarantee is quite unlike the guarantee that was decided in Chew Soot Tat (see also *Carlsberg Brewery Malaysia Bhd v Soon Heng Aw Sons Sdn Bhd & Ors* [1989] 1 MLJ 105H–I per Idris J (as he then was).

[57] In *Mohd Taib*, the appellant had succeeded in raising serious questions of law relating to the absence of consideration and past consideration. However, in the case before me, these questions were answered by the preamble to and cl l(i) and 5 of the guarantee, ie, existing and future facilities are expressly included herein (see *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267 per Suffian LP (as he then was)

and Lee Hun Hoe (CJ (Borneo) (as he then was)), followed by Lamin J (later PCA) in *Development & Commercial Bank Bhd v Syarikat Farmco Sdn Bhd & Ors* [1988] 3 MLJ 275 at 277.

[58] I therefore hold that the second defendant's contention herein is without any merits.

NOMINEE DIRECTOR

[59] The second defendant claimed that she was merely acting as a nominee director for the first defendant and so could not be liable for the debt of the first defendant.

[60] It was submitted for the plaintiff that the second defendant's liability was founded on the guarantee.

[61] In my view, the second defendant's liability is expressly contained in the guarantee and the fact that she is perceived as a nominee director does not detract from her liability as a guarantor. I am therefore unable to accept the contention raised for the second defendant.

OTHER ISSUES RAISED

[62] It needs to be observed that the second defendant's learned counsel has also raised the issue of the restructuring exercise of another company, the position of the land charged to the plaintiff by way of security for the facilities, and the relationship between the plaintiff and Affin Bank Bhd. Having carefully considered all these issues, I am of the view that they do not show any substance at all and are hereby rejected.

[63] On the foregoing grounds, I dismiss this appeal with costs. The decision of the learned registrar is hereby affirmed.

Appeal dismissed with costs.

Reported by Eugene Daniel Loius